In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-845

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

FREDDY McCUTCHEN,
Respondent

PETITION FOR WRIT OF CERTIORARI

TO

THE SUPREME COURT OF PENNSYLVANIA

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The Petitioner, Commonwealth of Pennsylvania respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Pennsylvania Supreme Court entered in the above-entitled case on July 7, 1975.

OPINION BELOW

The opinion below of the Pennsylvania Supreme Court is unofficially reported as of 343 A.2d 669 (1975), and is set out as Appendix A. (The official report of this case has not yet been published.)

JURISDICTION

The order of the Pennsylvania Supreme Court was entered on July 7, 1975. A timely petition for rehearing was filed by petitioner and was denied on September 16, 1975. This petition for certiorari was filed within ninety days of that denial. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Do the holdings of this Court in Miranda v. Arizona, 384 U.S. 436 (1966); In Re Gault, 387 U.S. 1 (1967); Haley v. Ohio, 332 U.S. 596 (1948); and Gallegos v. Colorado, 370 U.S. 49 (1962), mandate a per se rule excluding from evidence any confession given by a juvenile suspect whenever that suspect has waived his Constitutional rights, absent consultation with a parent or other interested adult who himself has first been advised of the juvenile's rights; or, is such a prophylactic rule mandated by the fifth and/or fourteenth amendments to the United States Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution,
Amendment Fourteen, Section One.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution,
Amendment Five - Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject of the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Procedural History

Respondent, Freddy McCutchen, was indicted on charges of murder and sodomy at No. 159-160, July Term, 1971, Court of Common Pleas of Philadelphia County. Prior to trial, by his attorney, he orally moved to suppress his confession to the crimes, and a hearing was held before the Honorable Victor J. DiNubile on June 6 and 7, 1972. At the conclusion of the hearing, McCutchen's motion was denied. The case was then called for trial before the Honorable James T. McDermott and a jury on October 2, 1972, and verdicts of guilty of murder in the first degree and sodomy were returned on October 6. Thereafter, post trial motions were heard, and denied by the trial court on September 17, 1973. Consecutive sentences of imprisonment for life and ten to twenty years were imposed on October 3, 1973.

A direct appeal was taken to the Supreme Court of Pennsylvania, which reversed the conviction in an opinion issued on July 7, 1975. Commonwealth v. McCutchen, __ Pa. __, 343 A.2d 669 (1975). (Appendix A). Two justices dissented and the Chief Justice did not participate in the decision. A petition for reargument was filed by the Commonwealth on July 14, 1975. This petition was denied on September 16, 1975.

Facts

McCutchen's conviction arose out of the wanton killing of six year old boy, Wilfredo Martinez. The body was found by Philadelphia police at 10:30 p.m. June 7, 1971, alongside a railroad siding at the top of an embankment behind a factory (N.T. Trial 301).[1] The body was still warm, and was covered with moist blood (N.T. Trial 311). An autopsy was conducted by Dr. Robert L. Catherman; the cause of death was "massive destruction" to the head and brain resulting from a beating with a blunt instrument, which caused many compound and simple fractures of the skull, extensive lacerations, bruising, hemorrhaging and damage to the brain tissues. The right side of the face from the temple to the jaw, the left side of the face around the eye, the mouth and the area above the right ear were most severly injured; the facial and skull bones in those areas were literally fragmented, and many teeth were dislodged. In addition, internal injuries to the abdomen and the organs in that area had occurred, and the knees were scratched and bruised. The doctor also found that Wilfredo had been buggered: lacerations and bruises

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[1]Testimony presented at trial will be cited herein as N.T. Trial. Testimony at the Suppression Hearing will be cited N.T. Supp. Hrg.

were found in the rectum and anus, and sperm was found to be present (N. T. Trial 340-366). When McCutchen was questioned the following evening, June 8, 1971, he confessed to the crime. He said that he had encountered the little boy crying on the street and began walking with him. He took him up to the tracks, spread out his (McCutchen's) jacket on the ground, told him to take down his pants, and buggered him. The little boy began screaming, so McCutchen hit him with a branch from a tree several times to make him stop. Later, he threw away his jacket because it was dirty (N.T. Trial 524-38). McCutchen's confession was verified by the recovery of his blood and semen stained jacket (which he identified) (N.T. Trial 443-45), and the blood stained branch (N.T. Trial 445-47), and by the discovery of his comb near the body (N.T. Trial 369). In addition, it was testified that McCutchen had been seen on the street with Wilfredo before his death (N.T. Trial 385-86).

McCutchen was first contacted by police about 6:30 p.m., June 8. He immediately confirmed what the police had been informed, that he had discovered the body, and agreed to help in the investigation by going to the Police Administration Building. Before being driven there, he was given Miranda warnings and unequivocally stated that he understood them and was willing to talk to police without an attorney.

When he arrived at the Police Administration Building about 7:15 p.m., these warnings were reiterated, and McCutchen was interviewed over a two hour period until 9:25 p.m., during which he related that he had found the body after purportedly seeing an older man fleeing from the spot. Not all this period was devoted to questioning, because police were checking the information McCutchen was giving them (N.T. Supp. Hrg. 133). Eventually McCutchen suggested taking a polygraph test concerning his story; he told the police he had taken one on a previous occasion when he was apparently questioned in connection with a different homicide (N.T. Supp. Hrg. 51, 132-36). The test was arranged, and he was taken to the polygraph unit at 10:00 p.m. Beginning at about 10:30 p.m., the examiner conducted a pre-test interview concerning McCutchen's personal history and physical condition, formulated the questions to be asked and explained the test procedure. The test itself was conducted at about 11:45 p.m. (N.T. Supp. Hrg. 107); when it was completed the examiner told McCutchen the results (N.T. Supp. Hrg. 117), whereupon he changed his story and admitted killing Wilfredo (N.T. Supp. Hrg. 12). A detective again warned McCutchen of his rights at 11:55 p.m., and wrote out his confession in longhand (N.T. Supp. Hrg. 142); this was completed and the statement signed by McCutchen at 1:10 a.m. (N.T. Supp. Hrg. 148-149).

Earlier, prior to the polygraph test, or any admission, at about 11:30 p.m., a detective had gone to McCutchen's home to find his mother, after an earlier unsuccessful attempt to contact her by phone (N.T. Supp. Hrg. 52-54); at no time had McCutchen requested that anyone be contacted, but police determined that this should be done because of his age: He had told them that he was sixteen (N.T. Supp. Hrg. 46).[2] His mother arrived at about 1:00 a.m. (N.T. Supp. Hrg. 58); shortly thereafter, she was fully apprised of the situation by police and taken to see her son (N.T. Supp. Hrg. 151-52). Subsequently, beginning at 2:10 a.m. in the presence of his mother, McCutchen was again warned of his rights and repeated his confession, which was recorded in typewritten form, and then signed by him and his mother. The mother sat in the doorway to the room where she could see and hear. Apparently, when appellant admitted to her that he had committed the crime, she was extremely angered at him; he had been a troublesome son in the past (N.T. Supp. Hrg. 368-69). After she had talked to respondent, she told police she did not wish to remain, but they persuaded

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[2]McCutchen gave his date of birth as February 2, 1955. Later, police learned from his mother that he was 15.

her to do so; however she insisted on remaining outside the open doorway (N.T. Supp. Hrg. 208-09, 375-77). She testified that from previous experience she knew appellant had a right to an attorney at this point, but apparently she had no concern that he have one (N.T. Supp. Hrg. 387-90).

Later, after the mother had returned to her home, police contacted her by phone and received her consent to take a supplemental statement from McCutchen for the purpose of identifying certain items (N.T. Supp. Hrg. 216-24); however, neither these items nor the supplemental statement was ever utilized as evidence.

While McCutchen was but fifteen at the time, he was extensively experienced with the criminal law. He had been arrested sixteen times previously (N.T. Supp. Hrg. 100). He himself testified that he had been questioned by police on many previous occasions, one as recently as a week before, that he had served time at Glen Mills, that he had been represented by appointed attorneys, and that he was thoroughly aware of his rights from previous experiences (N.T. Supp. Hrg. 292-99, 314). His mother was similarly aware of his rights (N.T. Supp. Hrg. 387-88). In fact, as mentioned above, McCutchen had previously been questioned in connection with

a homicide, for which he was apparently exculpated, and had taken a polygraph test on that occasion. Coupled with the scrupulous warnings of rights he was given in this case, these factors leave no doubt that McCutchen was meaningfully aware of his rights. Furthermore, in view of his experience, it is clear that this particular suspect would not likely be overwhelmed by being questioned by police officers, despite his age, especially since the questioning was not initially directed to establishing his guilt but rather to his pretended role as an important witness. He was not questioned at length or treated with hostility and he willingly cooperated with police. Indeed, the polygraph test which ultimately prompted McCutchen's confession was his own idea.

In his defense, McCutchen testified that he had not killed the little boy, although he admitted he had been with him earlier (N.T. Trial 564-65); he said that he had "found" the body lying near the railroad tracks, that his jacket got bloody when he touched it, and that he had thrown the jacket away for this reason (N.T. Trial 566-67). He claimed he signed his confession because he was beaten by police, and that he had not been warned of his rights (N.T. Trial 575-78). Obviously, the jury did not accept this version of events.

REASONS FOR ALLOWING THE WRIT

INTRODUCTION

Preliminarily, it should be noted that the opinion below, standing alone, can best be characterized as obscure. Neither the Constitutional underpinnings of the holding nor the exact scope and nature of the holding can be discerned from examination of the McCutchen text. However, reading the opinion in the context of the earlier cases upon which the McCutchen majority relies and the cases following in McCutchen's wake, three things become clear: the holding in McCutchen is squarely grounded on the United States Constitution; the holding establishes a per se rule excluding all confessions by juveniles unless a parent is present and has himself been given Miranda[3] warnings; and the holding will be retroactively applied to all cases coming before the Pennsylvania Supreme Court on direct review, regardless of the date of the confession or of the trial. This holding is an erroneous application of federal Constitutional principles and decisions of this Court, and is in conflict with interpretation of the same principles and decisions by other courts of parallel jurisdiction. Moreover, the application of this prophylactic exclusionary rule to all

[3]Miranda v. Arizona, 384 U.S. 436 (1966)

cases coming before that court on direct review will have serious adverse effects on the orderly administration of justice.

I. THE PENNSYLVANIA SUPREME COURT HAS MISCONSTRUED THE UNITED STATES CONSTITUTION AND MISINTERPRETED DECISIONS OF THIS COURT.

The holding below is as follows:

> [I]t is clear that prior to appellant [sic] giving his first confession, which was in essence the same as his later formal confession, appellant, age fifteen, was not given the opportunity to consult his mother before he waived his rights, an opportunity, in our opinion, mandated by our Roane decision.

343 A.2d at 670.[4]

The court also relies upon its prior holding in Commonwealth v. Starkes, __ Pa. __, 335 A.2d 698 (1975). Examination of Starkes and Roane[5] makes clear the Constitutional underpinnings of the rule.

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[4]Where, as here, the official report has not yet been published, all citations will be to the Atlantic Reporter.

[5]Commonwealth v. Roane, __ Pa. __, 329 A.2d 286 (1974).

In Roane, a sixteen year old murder suspect was arrested at his home. His mother informed police at the time that she would follow them to the station. Approximately one hour after her arrival, she requested to speak with her son, which request was denied. In the meantime, Roane had been given his Miranda warnings, acknowledged his understanding of them, and agreed to speak with police. He orally confessed to the murder. Approximately one hour after the first request, Mrs. Roane again asked to see her son, and this time was allowed to do so. After they had spoken for a short time, an officer entered the room and began reiterating Miranda warnings in preparation for the taking of a formal written statement. At this time, the mother told the officers that she intended to obtain an attorney and she did not want any statement taken. Nonetheless, Roane again waived his rights and gave and signed the formal statement. Mrs. Roane refused to sign as a witness.

The court reversed Roane's murder conviction, relying on In Re Gault, 387 U.S. 1 (1967) and Gallegos v. Colorado, 370 U.S. 49 (1962). Although tacitly clinging to a totality of the circumstances rule in determining whether the waiver of rights was voluntary and intelligent, the court held:

> In order to support a finding that Daryl's waiver of his rights was knowing and intelligent, we believe that the record must indicate that Mrs. Roane had an opportunity to give Daryl the kind of helpful advice discussed in Gallegos, supra.

329 A.2d at 289.

In Starkes, a fourteen year old was arrested at his home for murder. His mother refused the offer of the police that she accompany her son to the Police Administration Building. Upon arrival there, Starkes was given Miranda warnings, acknowledged his understanding of his rights, and agreed to give a statement. He denied all knowledge or involvement in the crime. Later, his mother arrived and was taken to Starkes, where the two remained alone for a "pretty good while." During this period, the mother encouraged her son to tell the truth. After his conference, police again began to question Starkes and he confessed to the murder. In his mother's presence, he was again given Miranda warnings, and gave a formal typewritten statement.

Relying on Culombe v. Connecticut, 367 U.S. 568 (1961); Gallegos v. Colorado, supra; Haley v. Ohio, 332 U.S. 596 (1948); and Miranda v. Arizona, supra, the Pennsylvania Supreme Court reversed, holding:

> Where a parent is present we must at least require that parent to be advised of the rights possessed by the minor suspect befor that parent may be permitted to influence the decision which the minor must make. Whether the pressure to respond to police questioning flows from the overzealousness of the police or the unadvised entreaties of a well-intentioned parent, the result is equally offensive to our concept of due process and frustrates the protection sought to be provided by our Constitution.
>
> * * * * *
>
> [T]he Commonwealth has failed to establish that the decision of the appellant to respond to police

> questioning was not substantially influenced by the uninformed entreaties of the mother. In view of her lack of awareness as to appellant's rights, it cannot be said that the choice was a knowing and intelligent one.

335 A.2d at 703.

As noted above, the court below clung for a time to the fiction that it had announced no per se rule but was simply applying a totality of the circumstances test to determine whether a Miranda waiver was voluntary and intelligent. See, e.g., Commonwealth v. Webster, __ Pa. __, __ A.2d __ (October 3, 1975), and the dissenting opinion of Mr. Justice Pomeroy. Nonetheless, a rapid succession of juvenile confession cases has finally eroded even lipservice to the former standard. In Commonwealth v. Riggs, __ Pa. __, __ A.2d __ (October 30, 1975), the (majority of the) court issued an opinion which read, in its entirety:

> PER CURIAM 10-30-75
>
> Appellant was convicted of murder in the first degree, aggravated

robbery and burglary stemming from the robbery and death by beating of one Isadore Selez on May 6, 1970. He was sentenced to life imprisonment on the murder charge and a concurrent 5 to 15 year term of imprisonment for aggravated robbery. Sentence was suspended on the burglary conviction.

At the time of the offense and his arrest appellant was 15 years of age. He made no oral confession to the police before being granted the benefit of counsel or parental or informed interested-adult guidance. A motion to suppress the statement was made pre-trial and was denied; the statement was admitted into evidence at trial. We held recently in Commonwealth v. McCutchen, Pa. , A.2d (1975) that a waiver of Miranda

> rights obtained under such circumstances is involuntary. It follows that appellant's conviction must be reversed.
>
> Judgments of sentence reversed and new trial is ordered.

In Commonwealth v. Chaney, __ Pa. ___, __A.2d__ November 26, 1975), (set out as Appendix B) the court held:

> [S]ince the taking of appellant's appeal in this case, this court has in Commonwealth v. McCutchen, __ Pa. __, __ A.2d __ (1975), Commonwealth v. Starkes, __ Pa. __, __ A.2d __ (1975) and Commonwealth v. Roane, __ Pa. __, __ A.2d __ (1975), held that absent a showing that a juvenile had an opportunity to consult with an interested and informed parent or adult or counsel before he waived his Miranda rights, his waiver will be ineffectual.

At p. 34 herein.

Or, as Mr. Justice Pomeroy notes in dissent,

> As the majority opinion notes, this Court has recently created a per se rule requiring reversal whenever a juvenile has waived his constitutional rights, see Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), without the opportunity to consult with a parent or other interested adult, who himself has first been advised of the juvenile's constitutional rights.

At p. 35 herein.

It is clear beyond question that this Court's decisions in Miranda, Gallegos, Haley, Culombe, and Gault do not mandate any such per se exclusionary rule. In Schneckloth v. Bustamonte, 412 U.S. 218 (1973), this Court commented upon such cases as Haley, Gallegos, and Culombe, noting:

> The significant fact about all of these decisions is that none of

> them turned on the presence or absence of a single controlling criterion; each reflected a careful scrutiny of all the surrounding circumstances.

Id. at 226. (Citations omitted).

While Miranda did, indeed, set down prophylactic requirements, it is uncontested that those mandates were fully complied with by the police in the instant case. McCutchen was given Miranda warnings prior to any questioning. He acknowledged his understanding of his rights and exhibited a willingness to cooperate with the police in their investigation. He then gave a fabricated statement in which he claimed to have found the body after seeing an older man running from the scene. After police efforts to identify this man failed to turn up any corroboration for the existence of such a person, McCutchen suggested to police that they give him a polygraph test. After he failed the test, he confessed to the murder. McCutchen was treated well by the police, given warnings which he apparently fully understood, and spoke to the police freely. He was thoroughly conversant with police procedures, having been arrested sixteen

times before, and once before questioned concerning a homicide. Indeed, he felt so sure of himself as to suggest procedures to the police. Under all these circumstances, his confession was clearly voluntary under Gallegos, Haley and Columbe, and his waiver of rights valid under the guidelines of Miranda.

In Re Gault, the remaining case relied upon by the court below, is simply inapposite. Therein, this Court explicitly stated:

> We do not in this opinion, consider the impact of these constitutional provisions upon the totality of the relationship of the juvenile and the state. . .[W]e are not here concerned with the procedures or constitutional rights applicable to the prejudicial stages of the juvenile process.

387 U.S. at 13.

Even the dicta from Gault cited by the court below in Roane, supra, falls far short of sustaining the per se reversal rule effectuated by the court below. This Court simply stated that juveniles have the same constitutional privilege against self-incrimination as adults and that:

> If counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.

387 U.S. at 55.

The circumstances of the instant confession could hardly be further from the product of "adolescent fantasy, fright or despair."

For the foregoing reasons, it is respectfully submitted that the Pennsylvania Supreme Court erred in concluding that the per se exclusionary rule invoked below was required by the United States Constitution and the cited decisions of this Court.

II. THE DECISION BELOW IS IN CONFLICT WITH NUMEROUS FEDERAL AND STATE SUPREME COURTS.

While the precise issue addressed below -- the notion of requiring the presence of a Miranda-warned adult for

all juvenile waivers -- has seldom been adverted to in the appellate courts of other jurisdictions, numerous other courts have held juvenile Miranda waivers effective where no parent was present.

For instance, in Cotton v. United States, 446 F.2d 107 (8th Cir. 1971), the Miranda waiver of a fifteen year old was upheld even though no parents were present during questioning. In that case, the defendant had had only four years of schooling (he entered the first grade at the age of ten) and misspelled the word "true." The following cases are in accord, that is, waivers by teenagers without the advice of an informed adult have been upheld: United States ex rel. Hayward v. Johnson, 508 F.2d 322 (3d Cir. 1975), cert. denied, __ U. S. __ (June 16, 1975) (17 years old; no parent present); United States v. Miller, 453 F.2d 634 (4th Cir. 1972), cert. denied, 406 U.S. 923 (14 years old; no parent present); West v. United States, 399 F.2d 467 (5th Cir. 1968), cert. denied, 393 U.S. 1102 (1969) (16 years old; no parent present); Glinsey v. Parker, 491 F.2d 337 (6th Cir. 1974), cert. denied, 417 U.S. 921 (17 year old; no parent present; confession upheld, but conviction reversed on other grounds).

In the following cases, other state supreme courts have upheld Miranda waivers by juveniles without the advice of a parent: Theriault v. State, 66 Wis. 2d 33, 223 N.W. 2d 850 (1974); People v. Lara, 62 Cal. Rptr. 586, 432 P.2d 202 (1967); People v. Stephen J.B., 23 N.Y. 2d 611, 246 N.E. 2d 344 (1969); State v. Rone, 515 S.W. 2d 438 (Mo. 1974); McLeod v. State, 229 So. 2d 577 (Miss. (1969); State v. Hogan, 297 Minn. 430, 212 N.W. 2d 664 (1973); State v. Sylvester, 298 So. 2d 807 (La. 1974); State v. Dawson, 278 N.C. 351, 180 S.E. 2d 140 (1971); Vaughn v. State, 3 Tenn. Cr. App. 54, 456 S.W.2d 879 (1970) (review denied by Tennessee Supreme Court, July 6, 1970.)

Since the court below grounds its per se rule on the due process clause as well as on Miranda (see Starkes, supra, at 703), relying on Gallegos, Haley, and Culombe, the holding below is also in conflict with many pre-Miranda cases finding juvenile confessions voluntary. The following federal cases have upheld pre-Miranda confessions by juveniles where no parent was present: Mikarewicz v. Scafati, 438 F.2d 474 (1st Cir. 1971), cert. denied, 402 U.S. 980 (15 year old); Michaud v. Robbins, 424 F.2d 971 (1st Cir. 1970) (15 year old illiterate with mental age of 12); United States ex rel. Burgos v. Follette, 448 F.2d 130 (2d Cir. 1971), cert. denied, 406 U.S. 950 (1972) (16 year old);

United States ex rel. Loray v. Yeager, 446 F.2d 1360 (3d Cir. 1971) (16 year old); United States ex rel. Brown v. Rundle, 450 F.2d 517 (3d Cir. 1971) (16 yeard old); United States ex rel. Richardson v. Vitek, 395 F.2d 478 (7th Cir. 1968) (15 year old); United States ex rel. McMath v. Pate, 435 F.2d 174 (7th Cir. 1970) (16 year old).

In all of the above-cited jurisdictions, the age of the defendant and the presence or absence of a parent are always factors to be weighed in determining the voluntariness of a confession and the validity of a Miranda waiver. Yet all stand in conflict with the per se exlusionary rule adopted by the court below.

III. THE DECISION BELOW POSES SERIOUS PROBLEMS TO THE ORDERLY ADMINISTRATION OF JUSTICE.

In Commonwealth v. Chaney, supra, set out at Appendix B, the court below held the per se reversal rule invoked below applicable to any case coming before that court on direct review. This includes cases such as Commonwealth v. Webster, supra. Webster was convicted of murder in 1969. He took no appeal. In 1973 he filed a post-conviction petition requesting the right to file a direct appeal nunc pro tunc. This right was granted. On "direct"

appeal on October 3, 1975, the court below reversed under McCutchen. (It is noteworthy that the opinion of the court below on the timely appeal of Chaney's co-defendant was, until McCutchen, the leading Pennsylvania case on juvenile confessions. There, the court relied on the totality of the circumstances test and upheld the confession. See Commonwealth v. Moses, 446 Pa. 350, 287 A.2d 131 (1971).)

Thus the holding below will operate to overturn virtually all convictions involving juvenile confessions[6] in cases tried prior to McCutchen, where a direct appeal has not yet been decided. In cases where the confession was given prior to McCutchen but the case tried after McCutchen, the confession will have been or have to be suppressed. Moreover, because of the obscurity of the opinion below, there will undoubtedly be post-McCutchen interrogations and trials which fail to comply with the per se rule. (Only after Commonwealth v. Riggs, supra, and Commonwealth v. Chaney, supra, was the prophylactic nature of the rule made clear).

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[6]While in some percentage of cases parents have consulted with juvenile suspects, police have almost never given Miranda warnings to those parents.

It is difficult to give any accurate estimate of how many cases will thus be affected, but some glimmering of the magnitude can be had by reference to some readily available statistics. Considering only homicide cases in Philadelphia County for the years 1973 and 1974, official records indicate the following: In 1973, 70 juveniles were charged with murder; 53 gave statements. In 1974, 71 juveniles were charged with murder; 57 gave statements. Of these 110 cases where there were confessions, only two have been finally decided on appeal. Of the other 108 all convictions are subject to automatic reversal and untried cases subject to suppression under McCutchen. Adding to these, the 1975 cases, all pre-1973 cases where no appeal has been finally decided, all cases involving crimes other than homicide, and all cases arising in the other 66 counties in Pennsylvania, the mind reels at the prospect of discovering how many hundreds of cases comprise the total. Suffice it to say that the adverse effect of McCutchen's per se reversal rule on the administration of justice in Pennsylvania is overwhelming, and that this case is of the utmost importance to the Commonwealth.

CONCLUSION

For all the foregoing reasons, the Commonwealth of Pennsylvania respectfully requests that a writ of certiorari issue to review the decision below.

Respectfully submitted,

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APPENDICES

Appendix A: Opinion of the Court Below

Appendix B: Unreported Opinion, Commonwealth v. Chaney, ___Pa.___, ___A.2d___ (entered November 26, (1975)

COMMONWEALTH of Pennsylvania

v.

Freddy McCUTCHEN, Appellant.

Supreme Court of Pennsylvania.

July 7, 1975.

Rehearing Denied Sept. 16, 1975.

OPINION OF THE COURT

O'BRIEN, Justice.

Appellant, Freddy McCutchen, was tried by a judge and jury and found guilty of murder in the first degree and sodomy. Post-trial motions were denied and appellant was given a life sentence, with a ten-to-twenty-year sentence on the sodomy charge to run consecutively with his life sentence. This appeal followed.

Appellant, age fifteen at the time of his arrest, argues that his confession should have been suppressed based on our decisions of Commonwealth v. Starkes, ____ Pa. ____, 335 A.2d 698 (1975) and Commonwealth v. Roane, ____Pa.____, 329 A.2d 286 (1974), because he was not given the benefit of parental or interested-adult guidance prior to giving his confession. We agree.

The facts surrounding appellant's confession are as follows. On June 8, 1972, at or about 6:30 p.m., appellant was approached by two officers of the Philadelphia Police and asked if he would accompany them to police headquarters in order that he could be interviewed con-

APPENDIX A

cerning the death of Wilfredo Martinez. Appellant consented to go with the police and arrived at police headquarters at or about 7:00 p.m., where he was given his Miranda warnings and questioned from 7:15 p.m. until 9:25 p.m. During this time, appellant denied any involvement in the homicide, but gave the police a statement in which he said that he saw an elderly man run from the area in which the victim's body was found. From 9:25 p.m. until 10:30 p.m., appellant was left alone and then, with his consent, was taken to a polygraph room where a pretest interview was conducted from 10:30 p.m. until 11:45 p.m. After the polygraph tests were administered, appellant was told that he was lying and at about 11:55 p.m., appellant gave an incriminating statement which was recorded in longhand and signed by appellant at 1:10 a.m. After this first confession was ended, the police took appellant's mother to police headquarters; upon her arrival she was told that her son had confessed to the homicide. She then spoke with her son, and another formal typewritten confession was taken, concluding at 4:20 a.m. At no time prior to appellant's first confession was he afforded the opportunity to consult with his mother or an interested adult.

The Commonwealth, in an effort to distinguish the instant case from our decisions of Roane and Starkes, supra, argues that appellant's confession was voluntary because he did not ask to have his mother present, and that because of his prior experience with the police, he was aware of the consequences of his confession and did not need guidance in deciding whether to confess. We are of the opinion that these

arguments do not take this case out of our Roane and Starkes rationale. In Roane, supra, we stated:

> ". . . In order to support a finding that Daryl's waiver of his rights was knowing and intelligent, we believe that the record must indicate that Mrs. Roane had an opportunity to give Daryl the kind of helpful advice discussed in Gallegos, supra. The instant case reveals no such opportunity." At page ___, 329 A.2d at page 289.

In the instant case, the Commonwealth admits that appellant's mother was not present when he gave his first informal confession but was only taken in to see appellant when his final confession was taken. Under these facts, it is clear that prior to appellant giving his first confession, which was in essence the same as his later formal confession, appellant, age fifteen, was not given the opportunity to consult his mother before he waived his rights, an opportunity, in our opinion, mandated by our Roane decision.

Judgments of sentence reversed and case remanded for proceedings consistent herewith.

JONES, C.J., took no part in the consideration or decision of this case.

EAGEN AND POMERY, JJ., dissent.

APPENDIX A

[J140]
IN THE SUPREME COURT OF PENNSYLVANIA
Eastern District

COMMONWEALTH OF PENNSYLVANIA

v.

MICHAEL, CHANEY, Appellant

Nos. 120 and 122 January Term, 1974

Appeal from the Judgment of Sentence of the Court of Common Pleas, Criminal Trial Division, of Philadelphia, at Nos. 81 and 82 October Sessions, 1972.

OPINION OF THE COURT

11/26/75

O'BRIEN, J.

Appellant, Michael Chaney, was tried by a judge and jury and found guilty of murder in the first degree and aggravated robbery. Post-trial motions were denied and appellant was sentenced to life imprisonment. Appellant filed this appeal and we reverse his judgment of sentence.

Appellant argues that the court erred in failing to suppress his confession. Chaney, age sixteen, was arrested September 8, 1972, at approximately 11:25 a.m. and transported to police headquarters, where he arrived at 11:45 a.m. He was warned of his rights at 12:05 p.m. and thereafter gave his first oral admission at 1:05 p.m. He was then questioned, given a polygraph examination and finally gave a final written statement at 7:54 p.m. At his suppression hearing and in post-trial motions, appellant argued that based on our decision in Commonwealth v. Harmon, 440 Pa. 195, 269 A.2d 744 (1970), his con-

fession should have been suppressed because he was a juvenile and because he did not voluntarily give the confession. However, since the taking of appellant's appeal in this case, this court has in Commonwealth v. McCutchen, ___Pa.___, ___A.2d___ (1975), Commonwealth v. Starkes, ___Pa.___, ___A.2d___ (1975) and Commonwealth v. Roane, ___Pa.___, ___A.2d___ (1975), held that absent a showing that a juvenile had an opportunity to consult with an interested and informed parent or adult or counsel before he waived his Miranda rights, his waiver will be ineffectual. In the instant case, no such consultation was conducted prior to appellant's waiver and, in fact, his mother did not see him until 2:30 p.m., some three hours after his arrest; his confession must, therefore, be suppressed under our McCutchen rationale. While appellant's arrest, confession and trial took place before our decisions concerning a juvenile's waiver of his Miranda rights, he is nevertheless entitled to the benefit of those decisions since he was on direct appeal at the time of our McCutchen decisions. See Commonwealth v. Little, 432 Pa. 256, 248 A.2d 32 (1968).

Judgment of sentence reversed and case remanded for a new trial consistent with this opinion.

Mr. Justice Pomeroy filed a Dissenting Opinion in which Mr. Chief Justice Jones and Mr. Justice Eagen joined.

APPENDIX B

[J.140]

IN THE SUPREME COURT OF PENNSYLVANIA
Eastern District

COMMONWEALTH OF PENNSYLVANIA

v.

MICHAEL CHANEY, Appellant

Nos. 120 and 122 January Term, 1974

Appeal from the Judgment of Sentence of the Court of Common Pleas, Criminal Trial Division, of Philadelphia, at Nos. 81 and 82 October Sessions, 1972.

DISSENTING OPINION

11-26-75

POMEROY, J.,

As the majority opinion notes, this Court has recently created a per se rule requiring reversal whenever a juvenile has waived his constitutional rights, see Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694 (1966), without the opportunity to consult with a parent or other interested adult, who himself has first been advised of the juvenile's constitutional rights. See Commonwealth v. Riggs, Pa. , A.2d (1975); Commonwealth v. Webster, Pa. , A.2d (1975); Commonwealth v. McCutchen, Pa. , A.2d (1975); Commonwealth v. Starkes, Pa. , A.2d (1975); Commonwealth v. Roane, Pa. , 329 A.2d 286 (1974. I have consistently expressed my disagreement with this rule. See the dissenting opinion of Mr. Justice EAGEN in Common-

wealth v. Roane, supra, joined by Mr. Chief Justice JONES and this writer, and Part I of the dissenting opinion of this writer in Commonwealth v. Webster, supra. I continue to adhere to the views expressed in those opinions that the rule is unwise, unnecessary and unwarranted. Hence this dissent.

MR. CHIEF JUSTICE JONES AND
MR. JUSTICE EAGEN join in this dissent

APPENDIX B